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JAMES H. McKE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff in Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

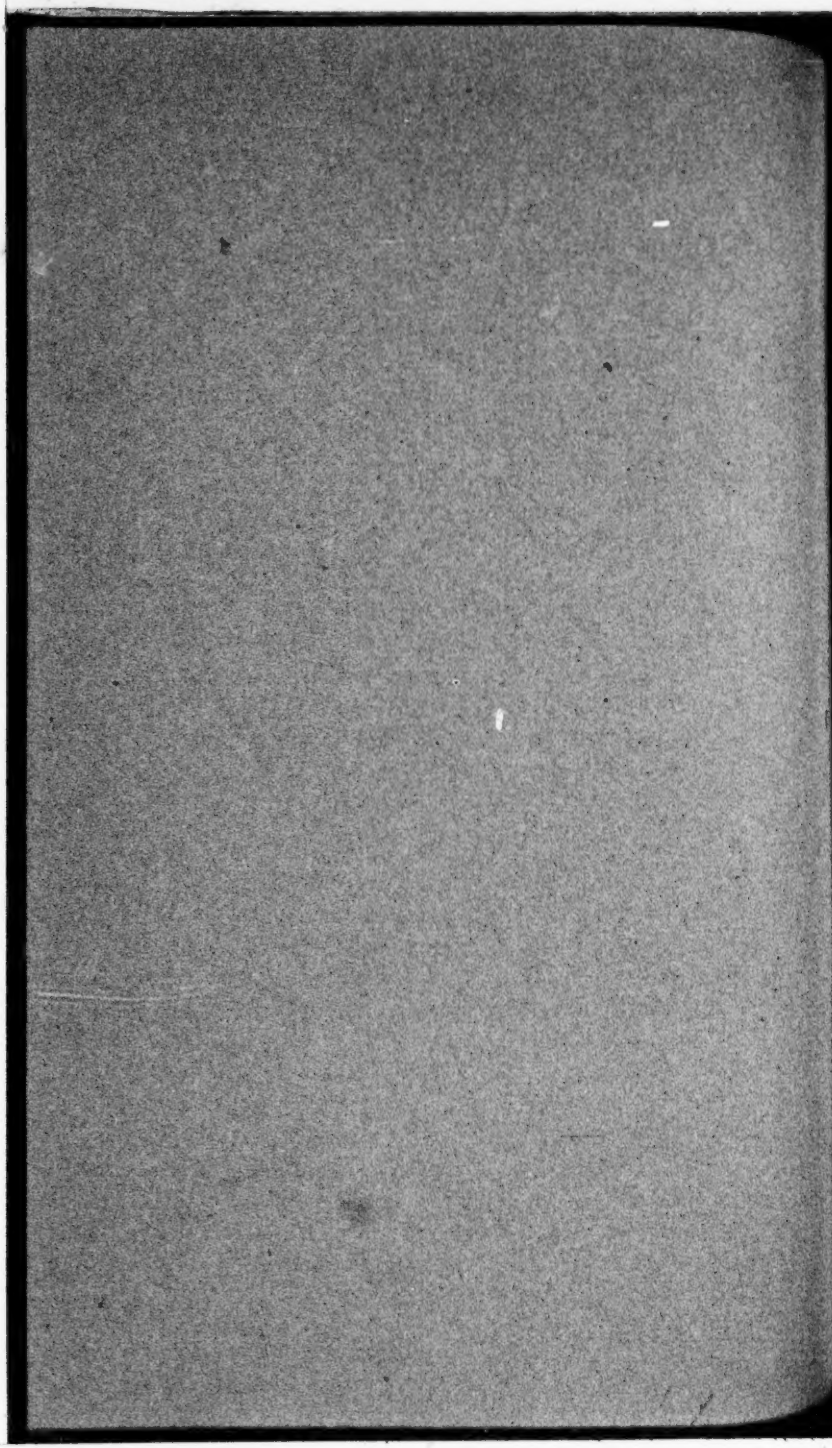
MOTION TO DISMISS.

BRIEF ON MOTIONS TO DISMISS.

THE FACTS.

J. A. MAGOON,
F. B. McSTOCKER,
DOROTHEA EMERSON,
Pro se.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.



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MOTION TO DISMISS.

And now comes J. A. Magoon, F. B. McStocker and Dorothea Emerson, defendants in error above named, and move this court to dismiss the writ of error.

This motion is based upon the ground that this Court is without jurisdiction to hear and determine said writ of error for the following reasons:

First. There is no final judgment of the Supreme Court of the Territory of Hawaii herein which can be reviewed by this Court on writ of error.

Second. The decision of the Supreme Court of the Territory of Hawaii overruling the exceptions of plaintiff, was filed therein on the 19th day of December, 1904, at which time there was no statutory provision for a writ of error to the Supreme Court of the Territory of Hawaii from this Court to review the matters and things set forth in this action.

Third. That the only question reviewed by the Supreme Court of the Territory in the decision aforesaid was the order of the trial court overruling plaintiff's motion for a new trial and no writ of error lies from this Court to review said order.

Dated Honolulu, T. H., December 1, 1906.

Alfred Magoon

F. Burbridge

Dorothea Emerson

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BRIEF ON MOTIONS TO DISMISS.

THE FACTS.

The case was tried before a jury in the Circuit Court of the First Circuit, Territory of Hawaii, and on November 9th, 1903, an order of non-suit was entered therein. The case was then taken to the Supreme Court of the Territory on Bill of Exceptions, said Supreme Court refused to consider any exceptions except that relating to the refusal of the trial court to grant a new trial; and after a hearing in that court, the exception was overruled by a decision entered on December 19th, 1904. A motion for a rehearing was filed in said Supreme Court which motion was denied on March 6th, 1905. A petition for allowance of writ of error was filed in the Supreme Court of the Territory on May 26th, 1905, and the writ of error issued out of this Court on August 14th, 1905. On March 3rd, 1905, an act was passed by the Congress allowing

writs of error and appeals from the Supreme Court of the Territory to this Court in all cases where the amount involved, exclusive of cost, exceeds the sum or value of Five Thousand Dollars.

QUESTIONS OF LAW.

The only question of law involved in this motion is, does a writ of error lie in this matter? The question may be considered under three heads.

1st. Is the decision of the Supreme Court of the Territory overruling plaintiff's exception a final judgment on which a writ of error of this Court will lie?

2nd. Does the act of March 3, 1905, authorize the issuance of writ of error in a case decided by the Supreme Court of the Territory on December 19th, 1904, when a decision denying a rehearing was filed on March 6, 1905?

3rd. Does a writ of error lie on the decision of the Territorial Supreme Court affirming the trial court in its refusal of a new trial?

FIRST.

As to the first question, it has been decided by the Supreme Court of the Territory in a recent case (Meheula vs. Pioneer Mill Company, Limited, 17 Hawn. 91) that there is no statutory authority in the Territory for the entry of a final judgment on overruling bill of exceptions. In that case defendant's exceptions had been overruled by the Supreme Court of the Territory, and a motion for a rehearing denied. The defendants thereupon moved the court "that a final judgment be entered herein in this court affirming the judgment of the Circuit Court of the Second Circuit. * * * This motion was denied. The court says:

"It cannot be supposed that an affirming judgment supersedes the judgment affirmed. It is when a judgment is disaffirmed, or using the correct phrase, is vacated, that another judgment takes its place.

"But a judgment in an action at law is neither affirmed nor disaffirmed by this court in passing upon exceptions other than by vacating a judgment when entered, which, when exceptions are sustained, may be done by this court 'without any writ of error in like manner as if it had been entered by mistake.' R. L. Sec. 1867. If the exceptions are overruled nothing further is required but to notify the circuit court, in the form of a remittitur. Although judgment in an action at law formally concluded, 'wherefore it is considered by the court here that the plaintiff have and recover,' or otherwise as the case may be; yet this does not mean that the court makes the judgment which is merely a conclusion of law from a verdict, or in a jury waived case, from the judge's findings. A bill of exceptions, unlike a writ of error or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled, that is the end of the functions of this court relating thereto, nothing remaining but the order, notice or remittitur, on receipt of which the judgment in the circuit court if it had been entered but suspended pending the exceptions by the provisions of Secs. 1861 and 1865, R. L., remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law and not in consequence of any direction of this court. The records of the case and all papers filed in the circuit court are, it is true, often sent here with the bill of exceptions as in appeals and writs of error, but the practice is incorrect. When causes are appealed or brought here on error, we have before us the entire record and may 'review, reverse, affirm, amend, modify or remand for new hearing in Chambers such decision, judgment or decree in whole or in part and as to all or any of the parties;' in cases of appeal, R. L., Sec. 1860, or in cases of error 'the Supreme Court shall have power to enter such judgment in the case as in their opinion the facts and law warrant.' Ib. Sec. 1883. The defendant contends that under the Revised Laws, Section 1630, this

court has the power 'to make and award all such judgments, decrees, orders and mandates * * * as may be necessary to carry into full effect the powers which are or shall be given to it by the laws or for the promotion of justice in matters pending before it.' This court has by law no power in overruling exceptions to make a judgment in the case tried in the circuit court and such judgment is not required 'for the promotion of justice in matters pending before it,' for nothing is pending. In Tibbets v. Pali, 15 Haw. 137, judgment was entered in the circuit court, August 29, 1899, and exceptions were overruled June 9, 1905. The plaintiff then brought a writ of error which was quashed because not sued out within six months from the rendition of the judgment, the court citing with approval Cummins v. Iaukea, 10 Ib. 3, where 'judgment on the verdict was entered on May 25, 1894; exceptions had been overruled and there was nothing left to be done to perfect the judgment.' In Hind v. Wilder S. S. Co., 13 Ib. 176, an appeal from a decree in admiralty, the court said that under the statute relating to the powers of this court in appeal cases it 'has always exercised its discretion as to entering final decrees or remanding cases' referring to the statutes and practice elsewhere by which 'appellate courts usually have power either to enter final, complete decrees themselves, or to remand cases to the lower courts.' If such discretions were granted by law to this court in overruling exceptions, there would be no occasion for the defendant to 'strongly contend that if the exercise of its discretion will prevent harassing and technical objections from being thrown in defendant's way in the exercise of its legal right to appeal, then this court should exercise that discretion so as to facilitate the exercise of that right.'

"The practice in Massachusetts, as fixed by statute, gives the Supreme Court power to enter judgment in cases of exceptions as of appeals, ordering the record to be removed to the Supreme Court. Mass. Pub. St. 832.

"The defendant refers to the fishery cases of Damon and of Carter v. Territory, in which final judgments were entered by this court upon overruling exceptions. 14. Haw. 465. The defendant says, 'The Damon case was passed on by the Supreme

Court and the Carter case is now pending. A holding that the court was without power to enter those judgments would render them absolutely void and such result should be avoided if possible.' We are not aware that objection was made to the entry of judgment in those cases. If it was done, inadvertently or without contest it has not the force of precedent. We are of the opinion that this court can take no other action on overruling the exceptions than to authorize the usual remittitur. The motion is denied."

"A decree of affirmance without taxation of costs and without specifying the sum for which it is rendered is not a final decree."

Wheeler vs. Harris, 13 Wall. 51, 20:531.
The Lucille vs. Respass, 19 Wall. 3, 22:64.

"Though the merits of the cause have been substantially decided, while anything, though formal remains to be done, this court cannot pass upon the subject."

Life & Fire Ins. Co. of N. Y. vs. Adams 9 Pet., 571, 9:234.

"A judgment cannot be regarded as final for the purposes of jurisdiction until entered in a court from which execution can issue."

Green vs. Van Buskirk, 3 Wall 448, 12:245.

"Where no further proceedings were had in the state court except a verdict, and motion for new trial overruled, and no judgment was entered on the verdict, there is no final judgment and this court has no jurisdiction of the case."

National Life Lns. Co. vs. Scheffer, 26 L. Ed. 1110.

"If the finality of the decree is a question of doubt, and it was treated by the court below as not final, and it is only in the Supreme Court of the United States that the finality of the decree is claimed, the doubt will be resolved against its finality."

McGourkey vs. Toledo & O. C. R. Co., 146 U. S. 536.

SECOND.

It is submitted that the statute of March 3rd, 1906, does not authorize the issuance of a writ of error to review a decision of

the Territorial Supreme Court filed on December 19th, 1904. This would be to give the statute in question a retroactive effect. The fact that the motion for a rehearing was denied three days after the passage of the statute, makes no difference. This is not a case where the pendency of a motion for rehearing suspended the running of the time within which a writ of error may be allowed for the reason that at the time when the case was decided, there was no statute stating any time within which a writ of error might be allowed.

"Statutes are to be considered prospective unless the language is such as to show that they were intended to be retrospective."

Warren Manuf. Co. vs. Etna Ins. Co. Fed. Cases, 17206.

In re Billing. Fed. Cases, 1408.

Ellis vs. Connecticut Mut. Life Ins. Co., 8 Fed. 81.

THIRD.

The plaintiff's bill of exceptions to errors alleged to have been committed at the trial was not filed within the time provided by statute of the Territory, and the Territorial Supreme Court refused to consider any exception except that relating to plaintiff's motion for a new trial. The allowance or overruling of a motion for new trial is a matter that cannot be reviewed by this court.

"Where the judgment of the Supreme Territorial Court affirms the order of the District Court denying a motion for a new trial, it is now reviewable here on error."

Sparrow vs. Strong. 4 Wall Wall., 584.

Respectfully submitted,

Alfred Magoon

W. Burchard

Dorothea Emerson

Dated Honolulu, December 11. 1906.